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In the Supreme Court of the United States

October Term, 1953

No. 533

CHARLES ICHIRO SUEHIRO, RICHARD YOSHIO SUEHIRO and ROBERT KIKUO SUEHIRO, *Petitioners*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, As Successor to the Alien Property Custodian

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Hawaii (R. 38-44) has not been reported. The opinion of the Court of Appeals for the Ninth Circuit (R. 236-241) is reported at 206 F. 2d 892.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 31, 1953 (R. 242). A timely petition for rehearing was denied on October 16, 1953 (R. 243). The petition for a writ of certiorari was filed on January 14, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

It is not disputed that in Hawaii an oral gift of real property is treated as a contract for the sale of land for purposes of the statute of frauds (Pet. 10). The questions presented are:

1. Whether the written evidence of an alleged oral gift which does not indicate the terms constitutes a memorandum sufficient under Hawaiian law to satisfy the statute of frauds.

2. Whether the gift is excepted from the requirements of the statute of frauds by the donee's improvements added after the Alien Property Custodian had vested the property and despite the Custodian's admonition against undertaking the improvements except at the donee's own risk.

STATUTES INVOLVED

Pertinent portions of Sections 8721 and 8722, Chapter 166, of the Hawaiian Statute of Frauds are set forth on page 3 of the Petition.

STATEMENT

This litigation concerns the application of the Hawaiian Statute of Frauds to an attempted oral gift of realty located in Honolulu.

Petitioners are the three sons of Umetaro and Sumi Suehiro ("the parents"), both natives and nationals of Japan (R. 83, 183). In 1923 the parents purchased the property in suit (R. 83, 85). Title was conveyed to them by deed duly recorded (R. 85).

According to the testimony of an elderly neighbor and the members of the Suehiro family, including petitioners, in March 1941, about a month before the departure of the parents for Japan, the father told petitioners that he was giving each a designated portion of the property (R. 93, 110-111, 134, 156, 175, 192-197). No deed to the premises was executed (R. 111, 121, 165). The father's explanation was that he left the record ownership in his own name undisturbed and took the recorded deed with him to Japan because he was persuaded by a travel agent in Hawaii that his return to Hawaii would thereby be facilitated (R. 99, 119).

The parents left for Japan in April 1941 (R. 91-92). On July 26, 1941, the existing federal controls over foreign property (Executive Order No. 8389, as amended by Executive Order 8785, 3 CFR, 1943 Cum. Supp., p. 948) were extended to Japan (Executive Order 8832, 3 CFR, 1943 Cum. Supp., p. 969), thus prohibiting transactions by or pursuant

to the direction of Japanese nationals or involving their property in the United States, unless authorized by license. On August 8, 1941,[1] the parents wrote the sons a letter which reads in part as follows (R. 125-126):

> . . . I think that it is better to have the name of the house and land changed. Therefore, as this time, Koizumi's boy goes back on August 16, we will send the paper of land by him. Therefore, receive it and immediately ask Attorney Higashihara to handle the matter . . . Ichiro, since it may be worrisome for you to divide, I shall show you a rough idea. Therefore, after that, do as you people deem best . . .

Then followed a diagram showing the division among the three sons. The "paper of land" referred to was the deed which the parents had taken with them to Japan. The letter was sent together with the deed and seven sheets of paper, blank except for the signature of the parents (R. 10-11, 102-103). These were entrusted to Koizumi, a friend then visiting in Japan, to take back to Hawaii (R. 101, 204). But Koizumi did not return to Hawaii with these until October 1941 (R. 10, 207).

In the meantime, in September 1941, pursuant to regulations which required the reporting on Form

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[1] Inadvertently referred to as August 8, *1951*, in the opinion of the court below (R. 240).

TFR-300 of property in which a national of Japan had an interest on July 26, 1941 (6 F.R. 3722, 31 CFR, Cum. Supp., Part 130), the eldest son (one of petitioners herein) filed a Form TFR-300 (Defendant's Exhibit 4). He reported the property as belonging to Umetaro Suehiro, the father, answered "None" to the question whether anyone else asserted any claim thereto and declared that he was filing the report as agent for his father. The report was prepared with the assistance of a lawyer who, according to the son, permitted the report to be thus prepared although informed that the property had been given to petitioners and that only the legal title remained in the father (R. 224-225). The son explained that he had executed the report because he believed that it dealt with only "legal" owners (R. 225).

In October, 1941, Koizumi, upon returning to Hawaii, delivered the August 8 letter, the deed and the otherwise blank signed sheets of paper. The purpose of the signed blank sheets, according to the father, was to enable the property to be transferred to the names of petitioners. (R. 10-11, 105.) In attempting the transfer, the eldest son was advised by his attorney that it could not be accomplished because of the foreign property controls (R. 142-143).

For the years 1941, 1942, 1943 and 1944, the eldest son, as agent of his father, filed territorial income tax returns in which he listed, as income be-

longing to the father, rentals obtained from other tenants of the property (Defendant's Exhibits 3-B to 3-E; R. 219). The son's explanation for thus preparing the returns was that the title was in his father's name (R. 223). The rentals collected during this period were deposited to the eldest son's account and were used to support his younger brothers (R. 135). The eldest son also paid the real estate taxes assessed in the father's name and the premiums on the fire insurance policy carried in the father's name (Defendant's Exhibits 1-A to 1-E; R. 136-137). In addition, he made minor repairs, such as changing window screens and fixing the floors (R. 138).

In April, 1944, the Alien Property Custodian, acting under authority of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*), vested the property as owned by the father (R. 13). The total amount spent for repairs, taxes and insurance for the period between the alleged gift in the spring of 1941 and the vesting in 1944 (R. 138, 140-141) was considerably less than the rents received from other tenants living on the property (Defendant's Exhibits 3-B to 3-E).

After the property had been vested, petitioners added to the existing dwellings by converting a workshop into living quarters, an improvement which petitioners valued at $2,500. The $2,500 includes $800 in materials and the balance for labor

provided by members of the family (R. 139, 141-142). This improvement was made notwithstanding the refusal of the Alien Property Custodian's representative in Hawaii to give his consent and despite his admonition that the undertaking would be at petitioners' own risk (R. 163-164).

In August 1951, petitioners brought this suit under Section 9(a) of the Act to recover the vested property from the Attorney General, as successor to the Alien Property Custodian (R. 1-13).[2] The District Judge rejected the Government's contention that the Hawaiian Statute of Frauds precluded the action and held that an effective oral gift of the property had been made (R. 38-44). He based his holding principally on the maxim that "equity looks upon that as done which ought to have been done," reasoning that, since the parents meant to execute a deed and would have done so but for the travel agent's advice to retain the paper title, the court should attach the same consequences as if a deed had been executed. In his findings (R. 44-55), the District Judge found as a fact that petitioners had made substantial building improvements (R. 48).

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[2] The functions and authority of the Alien Property Custodian were transferred to the Attorney General by Executive Order 9788, October 14, 1946, 11 F.R. 11981 (3 CFR, 1946 Supp., p. 169). In this brief, the term "Custodian" will be used to refer to the Alien Property Custodian or to the Attorney General as his successor.

The Court of Appeals reversed on the ground that the action was precluded by the Hawaiian Statute of Frauds. It held: (1) that since the substantial improvements were made subsequent to the vesting order, after the Custodian's representative had refused to give his consent and after the representative had admonished petitioners that they were proceeding at their own risk, the improvements could not be relied on as part performance to except the oral gift from the requirements of the Statute; and (2) that since the letter of August 8, 1941, and accompanying papers did not show the terms and conditions of the purported transfer, the kind of memorandum required to satisfy the Hawaiian Statute of Frauds was not supplied (R. 236-241).[3]

ARGUMENT

The questions presented are narrow in scope and of little consequence generally or locally. The Court of Appeals' holding on the elements of a memorandum required to satisfy the statute of

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[3] The court below did not pass on the contention pressed by respondent that the August 8 letter and accompanying papers, assuming they were sufficient as a memorandum, constituted "dealings in . . . evidences of ownership" prohibited by the foreign property controls (Executive Order 8389, as amended, *supra*) and that accordingly they were ineffective as against the Custodian to render enforceable an obligation which was unenforceable on the date those controls were extended to Japan. *Orvis* v. *Brownell,* 345 U.S. 183; *Propper* v. *Clark,* 337 U.S. 472.

frauds accords with such expressions on the issue as appear in Hawaiian cases and represents well settled law elsewhere. None of the cases cited by petitioners (Pet. 6) supports their assertion that the court's decision is in conflict with Hawaiian law and, with perhaps one exception, the cases do not even deal with the issue.

On the question as to the effect of improvements undertaken despite the refusal of consent for them, the Court of Appeals' holding that petitioners could not rely on them as against the Custodian to except the gift from the operation of the statute of frauds any more than they could as against the donor, represents but an application within a narrow frame of reference of the firmly established principle that the effect of a vesting order is, at least, to transfer to the Custodian all the rights of the former enemy owner.

1. The Sufficiency of the Memorandum

The Hawaiian Statute of Frauds (Pet. 3) provides that no action shall be brought on an agreement for the sale of lands in the absence of a written memorandum of the transaction signed by the party to be charged. It is not disputed that in Hawaii an oral gift of land is treated as an agreement of sale for purposes of the statute (Pet. 10); *Mokuai* v. *Kapuniai,* 6 Haw. 160; *Yee Hop* v. *Young Sak Cho,* 25 Haw. 494, 500. The court below held that the letter of August 8, 1941, and accom-

panying papers (*supra,* p. 4), since they do not contain the terms and conditions of the transaction, fail to qualify as a memorandum sufficient to satisfy the statute (R. 241).

Petitioners do not maintain that these papers set forth the terms and conditions. Their contention is that in Hawaii this deficiency may be supplied by parol evidence. But the parol evidence in virtually all the cases on which they rely (Pet. 6, 12-13) was considered merely to determine whether there was any agreement at all, oral or otherwise.[4] Of course, parol evidence may be used, as indeed it was in the instant case, to show that the transaction relied on did in fact take place. That, however, is beside the point. It is here assumed that the gift relied on was made. The question is whether the written memorandum of it is adequate to satisfy the statute of frauds.

[4] This is true of *DeLuz* v. *Ramos,* 31 Haw. 799, 806-807 (oral agreement enforced because of sufficient "part performance"); *Vierra* v. *Ropert,* 10 Haw. 294, 300-301 (statute of frauds issue not reached because existence of agreement not established); and *Vierra* v. *Shipman,* 26 Haw. 369, 373, and 27 Haw. 457, 460 (oral agreement enforced because of sufficient "part performance"; sufficiency of memorandum issue expressly left open).

Jardin v. *Doucet,* 34 Haw. 651, involved a written contract. The parol evidence considered there was to show an agent's authority to sign. In *Fishel* v. *Turner,* 13 Haw. 392, parol evidence was admitted to *explain* and *clarify* the language of a memorandum. But the issue in the case was whether the terms of an agreement, having been established by parol evidence, were "put in writing." 13 Haw. at 394 and 397.

We have found no cases in Hawaii permitting parol evidence to render sufficient a memorandum which does not set forth the terms and conditions of the transaction relied on. On the other hand, there are explicit indications in Hawaiian cases in support of the decision below that the terms must be contained in the memorandum. The Chief Justice of the Hawaiian Supreme Court, acting as chancellor in *Rose* v. *Parker,* 4 Haw. 593, left no doubt as to this when he quoted the following commentary with approval (4 Haw. at 598):

> The memorandum must contain the essential terms of the contract with such a degree of certainty that it may be understood without recourse to show the intention of the parties.

See also, *People's I. & R. Co.* v. *Haw. Electric Co.* 9 Haw. 434, 437.

The authorities elsewhere are to the same effect. 49 Am. Jur., *Statute of Frauds,* 635-636; 2 Williston, *Contracts* (1936), 1619, 1622; Restatement, *Contracts* (1932) § 207. "It is well settled that the memorandum must be complete in itself, and it cannot be eked out by parol evidence." 2 Williston, *Contracts* (1936) 1619.

2. The Improvements Made After Vesting

The improvements on which petitioners rely to except the gift from the application of the statute were made after the Custodian had vested the

property, and in spite of his admonition against their being undertaken except at petitioners' own risk (*supra,* pp. 6, 7). Petitioners do not argue that, prior to the date of vesting, there were improvements on which they could rely as against the original donor. Nor do they argue that they could rely on improvements as against the donor if added against his wishes. It is settled in Hawaii as elsewhere that the acts relied on to except a transaction from the requirements of the statute of frauds must be done with knowledge and consent. *Yee Hop* v. *Young Sak Cho,* 25 Haw. 494, 500; *DeLuz* v. *Ramos,* 31 Haw. 799, 808; *Rose* v. *Parker,* 4 Haw. 593, 599; 49 Am. Jur., *Statute of Frauds,* 739; 101 A.L.R., Anno.—*Oral Land Contract—Part Performance,* 1067.

Petitioners' contention, advanced for the first time in their petition for rehearing in the Court of Appeals, seems to be that they may nevertheless rely on the post-vesting improvements as against the Custodian apparently on the ground that the effect of the vesting order was to transfer nothing more than bare custody of the property, at least until petitioners' rights were finally adjudicated. This Court, however, has settled that the effect of a vesting order is to transfer to the Custodian all the enemy's rights "as completely as if by conveyance, transfer or assignment." *Commercial Trust Co.* v. *Miller,* 262 U.S. 51, 56; *Cummings* v.

Deutsche Bank, 300 U.S. 115, 120.[5] Indeed, the Custodian may "exercise any rights or powers" with respect to the vested property "as though he were the absolute owner thereof * * *". Section 12 of the Trading with the Enemy Act, 40 Stat. 423, as amended, 50 U.S.C. App. 12; *United States* v. *Chemical Foundation,* 272 U.S. 1, 10-12. Hence, the Court of Appeals' holding that petitioners could not avail themselves of the improvements as against the Custodian, he being the "successor to the donor" (R. 240), was manifestly a correct application of a familiar and well established principle.

3. The Questions Presented Are of Little Consequence

The kind of memorandum of an oral gift of land required to satisfy the Hawaiian Statute of Frauds is of no consequence generally, and is of slight moment even in Hawaii. So far as we have

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[5] To the same effect: *United States* v. *The Antoinetta,* 153 F. 2d 138, 143 (C. A. 3), certiorari denied, 328 U.S. 863; *Polaroid Corporation* v. *Markham,* 148 F. 2d 219, 220 (C.A.D.C.); *Balkan Nat. Ins. Co.* v. *Com'r of Internal Revenue,* 101 F. 2d 75, 77 (C.A. 2); *Com'r of Internal Revenue* v. *Stearns,* 65 F. 2d 371, 374 (C.A. 2); *United States* v. *Borax Consol.,* 62 F. Supp. 220, 223 (N.D. Calif.); *Sarazin* v. *Wright Aeronautical Corp.,* 54 F. Supp. 244, 252 (S.D. N.Y.); *Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.,* 254 Fed. 852, 860 (S.D.N.Y.); *Vahle* v. *Markham,* 5 F.R.D. 315 (E.D. Pa.); *Todeva* v. *Oliver Iron Mining Co.,* 232 Minn. 422, 430-431, 45 N.W. 2d 782, 789; *Matter of Viscomi,* 270 App. Div. 732, 60 N.Y.S. 2d 897; *Stern* v. *Newton,* 180 Misc. 241, 246, 39 N.Y.S. 2d 593, 598.

been able to find, there is but one case passed upon by the Hawaiian Supreme Court which involved the application of the statute of frauds to an oral gift of land (*Rose* v. *Parker,* 4 Haw. 593) and that case was decided over three-quarters of a century ago and did not involve the sufficiency of a memorandum. Therefore, it cannot be said that the decision below misapplied Hawaiian law on the issue. But, in any event, review by this Court on an issue recurring so infrequently is scarcely warranted.

To make out an important federal question, petitioners repeatedly assert that what is at stake here is the right of an American claimant to "preserve" (Pet. 5, 6, 7) or "protect" (Pet. 14, 16, 17) his interest in vested property pending final adjudication of his claim. That is not the issue here at all. The question, raised for the first time in petitioners' request for rehearing below, apparently as an afterthought, is whether petitioners may avail themselves as against the Custodian of improvements on which they could not rely as against the donor to except their oral gift from the statute of frauds requirements. The Court of Appeals' resolution of that question is based upon a correct application of a familiar and well settled principle as to the effect of a vesting order and requires no further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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